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IN THE

Supreme Court of the United States

October Term, 1993

CABAZON BAND OF MISSION INDIANS, *et al*,
Petitioners,

v.

NATIONAL INDIAN GAMING COMMISSION, *et al*
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL OF FLORIDA

JONATHAN A. GLOGAU
Assistant Attorney General
(Counsel of Record)
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(904) 488-5899

COUNSEL FOR INTERVENOR STATES

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STATUTES AND REGULATIONS INVOLVED

Necessary for the proper interpretation of IGRA and the permissible use of technology in class II gambling operations is 25 U.S.C. § 2710(b)(1)(A):

> An Indian Tribe may engage in, or license and regulate class II gaming on Indian lands within the Tribe's jurisdiction, if-
>
> > (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by federal law)

STATEMENT OF THE CASE

This case is one straightforward of statutory construction. Congress specified in the Indian Gaming Regulatory Act that

> [e]lectronic or electromechanical facsimiles of any game of chance or slot machines of any kind

are not included in class II gaming under the Act, but are in the residuary class III. 25 U.S.C. § 2703(7)(A) and (B). The Tribes refer to the rules of the National Indian Gaming Commission (25 C.F.R. §§ 502.7 and 502.8) and complain that they improperly define the subject games in class III. The lower court held that:

> the legislative rules promulgated by the Commission [defining the subject machines in class III] are perfectly consistent with Congress' unambiguous intent as embodied in IGRA.

(App. B-7)[1]

This classification requires that the Tribes negotiate a compact with the states for the use of these machines where permitted. The games at issue in this case are described by the Tribes in their Statement of the Case. Their description does not do these games justice. When a player desires to engage in these games, he/she walks up to the machine, inserts money, activates the machine, and wins or loses by the sole operation of the machine. To the casual observer, these are slot machines as can be found on the casino floors in Las Vegas or Atlantic City. Representing them to be anything different is disingenuous.

Both courts below found that the games were intended to be in class III by examining the plain language of the Act. The Circuit Court, quoting the District Judge, held that:

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1 References to App. are to the Petitioners' appendix.

> The decision is "a simple one that may be accomplished solely by examining the statute itself (that is, without looking to the Commission's rules)." (App. A-6-7)

The courts below applied basic tenets of statutory construction and based their decisions on the plain language used by Congress.

The Tribes refer at length to their economic dependence on the subject machines in an apparent effort to create some equity in their continued use outside of the compacting process. As stated by the District Judge:

> Plaintiffs' briefs are filled with information regarding the importance of video pull-tabs to tribal economies.... Concerns of this sort, however, do not assist a court examining an unambiguous statute like IGRA.

(App. B-21)

The most important fact, glossed over in the Tribes' Petition, but never refuted below, is that the subject games are not simply the use of a computer to aid the playing of a game. These devices are self-contained gambling devices, as defined in the Johnson Act (15 U.S.C. § 1171, applicable to Indian country by 15 U.S.C. § 1175) and specifically prohibited in class II operations under IGRA. 25 U.S.C. §§ 2703(7)(B)(ii) and 2710(b)(1)(A).

SUMMARY OF ARGUMENT

This is not a case that comes within the class of cases which warrant review by this Court by *certiorari*. It is a simple case of statutory construction where the lower courts found that the plain meaning of the words used by Congress was clear and unambiguous. Review of this case will add nothing to the body of law regarding statutory construction. The cannon of construction respecting laws passed for the benefit of Indian tribes does not come into play. If the Tribes are unhappy with the balance struck in the passage of IGRA, then, in the words of the District Court below, such relief should come:

> not from a court impermissibly redefining words of a statute so as to reach a desired end, but from Congress, the institution with the power properly to delimit the scope of the Indians' right to conduct gaming. (App. B-22)

To the extent that the Tribes argue that this Court should accept jurisdiction over this case because the appellate court decision was erroneous, this Court does not generally exercise its *certiorari* jurisdiction to give a litigant another hearing. However, to the extent the correctness of the lower decision is relevant, the lower courts correctly found that the subject games were intended by Congress to be in class III.

These devices are "gambling devices" as defined in the Johnson Act and Congress repealed that Act only for class III gambling when used pursuant to a Tribal-State compact and where such machines are permitted. No explicit or implied repeal can be found for class II. In fact, an explicit statement can be found in the legislative history that the Johnson Act should continue to be effective for class II.

ARGUMENT

The *certiorari* jurisdiction of this Court is guided by rule 10 of the rules of this Court. This case is a simple one of statutory construction. Congress made its will painfully clear when it excepted "electronic or electromechanical facsimiles of any games of chance" from class II in IGRA. Congress created a careful balance in IGRA between the concerns of the states and the sovereignty of the Tribes. The only basis raised for this Court's jurisdiction is that found in rule 10.1(c) as an important question of federal law which has not been, but should be, settled by this Court. The issues raised by the Tribes herein are not important issues of federal law and need not be decided by this Court.

The Tribes focus in their petition on the need to create economic self-sufficiency, and state that the courts' interpretation of the Act is contrary to that intent. Other important purposes of IGRA were to provide a statutory basis for regulating Indian gambling and to shield the Tribes from the corrupting influences of organized crime. 25 U.S.C. §§ 2702(1) and (2). The implementing provisions accomplished these goals, at least partly by creating the Tribal-State compacting process and taking advantage of the states' experience in regulating the gambling permitted in each individual state. In finding that balance, Congress determined that electronic and electromechanical facsimiles of games of chance were not like bingo and other listed games in class II, but required the regulatory structure envisioned to come from the compact process.

One of the stated purposes of the IGRA was to create a level playing field for the Tribes, which is to allow them to conduct all gambling opportunities provided to the public generally. What the Tribes here argue would not create a level playing field but would give the Tribes a decided

advantage. The machines at issue are gambling devices as defined by the Johnson Act. In states where no such devices are permitted to the general public for any purpose, the Tribes argue that they should be permitted to use them as "aids" to class II gambling. By the clear language in the Act, Congress showed its intent not to create this "uneven" field. The decision below does not prevent effective competition, as alleged by the Tribes at page 11 of their Petition, but maintains the level playing field envisioned by Congress.

Under the holdings below, the language of the IGRA was clear and unambiguous. The Tribes' Petition clearly notes that they are currently using the subject machines without compacts with their respective states in violation of this unambiguous requirement. Here, the Tribes attempt to argue for equity in an illegal situation and ask this Court to accept jurisdiction based on this illegal activity. The Tribes knew or should have known in 1988 when the IGRA was passed that they were engaging in illegal activity. Their dependence on this illegal activity and their attempt to continue that activity in the face of the clear language of the IGRA and two court decisions is analogous to allowing a drug dealer to claim an equity in the continuation of his business because it is needed to support his family. This argument should not be countenanced.

To the extent that the correctness of the decision below is relevant to the decision of this Court on jurisdiction, that decision was correct. In the courts below, the Tribes never disputed, and took comfort in the fact that the machines in this case are exact duplicates of the pull-tabs game. A facsimile is an exact copy. This language in the statute is the starting point and the best evidence for determining Congressional intent.

The only argument of the Tribes for their interpretation of the Act comes from the Senate Report. Resort to this Report is unnecessary and inappropriate. The plain language of the statute governs. Even if this Report is to be considered, it does not support the Tribes contentions. The "aids" referenced in the Report are communication devices for broadening participation in games like bingo. That is, they can aid in the Tribes' ability to have more people play together in one pool. The subject machines are a more effective way of separating customers from their money, but are not the aids to participation contemplated in the Report. *Compare, Lion Manufacturing v. Kennedy,* 330 F. 2d 833, 836-37 (D.C. Cir. 1964)(Addressing machines that, although differing from slot machines in physical design, were calculated to function quite as effectively in separating the public from its money on a large scale.). In this case, the subject machines are virtually identical to video slot machines with the Tribes relying on a sleight of hand in the programming to distinguish them.

The Tribes also cannot avoid the effect of the Johnson Act. These devices are gambling devices as defined in that Act. IGRA contains a specific repeal of the Johnson Act for class III operations pursuant to a compact. There is no similar repeal for class II. With respect to the Johnson Act and class II gambling, IGRA provides:

> An Indian Tribe may engage in, or license and regulate class II gaming on Indian lands within the Tribe's jurisdiction, if-
>
> > (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity ***(and such gaming is not otherwise specifically prohibited on Indian lands by federal law)*** (emphasis added)

25 U.S.C. § 2710(b)(1)(A). The Senate Committee Report accompanying IGRA says that the federal law referenced is the Johnson Act:

> The phrase "not otherwise prohibited by Federal law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. § 1175 [the Johnson Act].

S.Rep. No. 446, 100th Cong. 2d Sess. 12 (1988) reprinted in 1988 USCCAN 3071-3106. The language of the IGRA and the Johnson Act contains no conflict and certainly no irreconcilable conflict that would imply a repeal for class II. Repeals by implication are not favored. *Rodriguez v. United States,* 480 U.S. 522, 524 (1987).

The Tribes argue that the statute should be interpreted in their favor under the cannon of construction in favor of Indian Tribes found in *Bryan v. Itasca County,* 426 U.S. 373 (1976). That cannon of construction, however:

> does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.

South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986). The courts below correctly found that no ambiguity exists in the language used by Congress and the Tribes' attempt to create one is unavailing.

The Tribes attempt to use bingo and the electronic aids for that game to mislead this Court into thinking that there is no difference between the devices at issue and the bingo aids. There is. The electronic devices used to enhance the game of bingo do not combine all aspects of the game into one machine creating a gambling device. Even with the use of the electronic aids described for bingo by the Tribes, the caller still calls the numbers (no matter how they are chosen) and the players still mark their cards (whether by

marking a paper card or having a freestanding cardminder keep track for him or her). In the pull-tab game, no such separation exists. This is a video slot machine and a gambling device under the Johnson Act. Congress clearly intended this machine to be limited to class III operations.

CONCLUSION

None of the Court's traditional reasons for granting *certiorari* are present in this case. The Tribes attempt to create an equity in illegal conduct and to make it an important issue by citing their economic dependence on the revenues generated by the illegal use of these machines. The decisions below are not clearly erroneous resulting in a miscarriage of justice warranting this Court's intervention. As the District judge correctly recognized, the Tribes' remedy lies in Congress where the proper balance may be reached, not in this court impermissibly redefining words of common meaning to reach a result not envisioned by Congress. *Certiorari* should be DENIED.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL OF FLORIDA

JONATHAN A. GLOGAU
Assistant Attorney General
(Counsel of Record)
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(904) 488-5899

COUNSEL FOR INTERVENOR STATES